

at random, not caring whether it was true or not, through overwhelming fear. Does that necessarily mean that he invented something that never happened? In his statement he not only admitted that the hand-grenade was given to him by an Indonesian, but he describes it with a fair amount of detail. If it were an invention on his part, it is hard to believe that he could go into details unless he had dealings with those Indonesians. I do not think a person would jeopardise his life to such an extent as the accused did unless it is true.

Accused also said that the hand-grenade was something told to him by a friend. We do not know who his friend is or what is his name. Accused said he would not betray his friend. We may ask ourselves if in times of emergency a citizen would betray his country rather than betray a friend.

Considering the defence as a whole, I am not satisfied that the defence has created a reasonable doubt as to the truth of the prosecution case. On the other hand, his defence strengthens the prosecution's case.

I therefore find him guilty and convict him.

Accused found guilty.

KOH SENG WAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Winslow J.) August 18, 1965]

[Singapore — Magistrate's Appeal No. 37 and 45 of 1965]

Penal Code, s. 408 — Criminal breach of trust by servant — Sentence manifestly inadequate.

The appellant appealed against his conviction for criminal breach of trust as a servant. The evidence showed that the appellant as sales representative of a motor company utilised his position and authority therein to divert goods to the value of \$18,000 belonging to the firm to recipients falling outside the scope of his authority with considerable cunning and resourcefulness. The appellant had been sentenced to six months imprisonment and the Public Prosecutor cross-appealed against sentence.

Held: on the facts the appellant was rightly convicted but as the sentence was manifestly inadequate having regard to the degree of cool and calculated resolution revealed in the perpetration of the frauds, the sentence should be increased to one year's imprisonment.

MAGISTRATE'S CRIMINAL APPEAL.

Edwin J. d'Souza for the appellant.

Tan Boon Teik (Solicitor-General) for the respondent.

Winslow J.: The appellant was originally charged with having committed criminal breach of trust of certain diesel engines, spare-parts and cash amounting to a little over \$18,000, being the property of Cycle & Carriage Co., Ltd., between February and May 1964. This composite charge was amended into five charges at the end of the prosecution case dealing separately

A with criminal breach of trust of the proceeds of sale of the same diesel engines and with criminal breach of trust of the spare-parts respectively. The appellant declined to recall any witness and remained silent on being called upon to make his defence. He was convicted accordingly and had nothing to say in mitigation of sentence. He was sentenced to six months' imprisonment on the main charge relating to criminal breach of trust of a sum of \$16,600 obtained on the sale of 8 engines, and one month concurrently in respect of each of the spare-parts set out in the remaining four charges. These involved comparatively much smaller sums.

C The appellant, in my view, was correctly convicted on these charges which were substantiated by the evidence which clearly showed that, whilst employed as sales representative of the firm in question, he utilised his position and authority therein to divert goods belonging to the firm to recipients falling outside the scope of his authority with considerable cunning and resourcefulness. In most cases he caused goods to be delivered against fictitious confirmation orders to persons other than those named therein and converted the proceeds thereof. In one case he purported to fulfil an order placed by a non-existent firm. The scheme adopted by him appears to be so clearly premeditated in its flagrant abuse of the special confidence placed in him by the firm and his fellow-employees as to leave no room for doubt that he was never the victim of any sudden temptation nor is there any suggestion in the evidence that his employer or other members of the staff were either so negligent or inefficient in the performance of their duties as to invite the criticism that they either encouraged or facilitated these offences by reason thereof.

G In other words I can find no mitigating circumstances in the appellant's favour apart from the fact that this is the first time he has been convicted.

H Even taking the latter into consideration I still consider that the sentence imposed was manifestly inadequate having regard to the degree of cool and calculated, if not brazen, resolution revealed in the perpetration of these frauds which were spread over a period of about 4 months in circumstances where he must have known that they would sooner or later be discovered. Luckily for the firm and unluckily for him his fraud came to light much earlier than he probably expected. The fact remains that meantime he had caused a loss to the firm of over \$18,000. Whilst the quantum of loss does not necessarily determine the degree of culpability involved I must take into consideration the factors to which I have referred relating to the state of mind with which and the period during which the offences were committed. The

fact of earlier discovery than perhaps expected does not mitigate at all nor has the appellant advanced any mitigating factor or plea for leniency based on any ground worthy of consideration.

The conviction is therefore affirmed and the appeal in this connection dismissed. He has abandoned his appeal against sentence but the Public Prosecutor has cross-appealed against sentence.

The appeal against conviction is dismissed but the Public Prosecutor succeeds on his appeal. I vary the sentence to one of one year's imprisonment on the first charge. The sentences on the remaining charges will remain, to run concurrently with the sentence on the first.

Appeal against conviction dismissed.

Sentence enhanced on the first charge.

Solicitors: *Edwin d'Souza & Co.*

THAMBYAH v. THAMBYAH

[O.C.J. (Abdul Aziz J.) August 23, 1965]

[K.L. — Divorce Suit No. 11 of 1965]

Husband and Wife — Divorce — Desertion — Constructive desertion — Cruelty — Onus of proof.

The petitioner applied for divorce alleging desertion and cruelty on the part of her husband.

Held: the onus of proof is on the petitioner and the court must be satisfied that the grounds have been proved beyond reasonable doubt. As the petitioner had failed so to satisfy the court in this case, the petition must be dismissed.

DIVORCE.

D. P. Xavier for the petitioner.

Abdul Aziz J. (delivering oral judgment): This is a petition for divorce based on two grounds, desertion and cruelty.

The petition stated that the parties were married in Seremban and that after the marriage the couple went back to Ceylon where they set up No. 27, Station Road, Ragama, Ceylon as their matrimonial home.

The petition charging the matrimonial offence are couched in very general terms but from what I gather from the evidence the petitioner alleges desertion and cruelty on the part of the husband. *Halsbury's* (vol. 12 pp. 242 *et seq*) says that the offence of desertion is a course of conduct and it must be proved that it has existed for a period of three years immediately preceding the presentation of the petition and for the act of desertion to exist there must be both the factum or physical separation and there must be intention to desert. All the necessary ingredients of desertion must continue throughout the desertion period. In the case of

A desertion the burden is on the petitioner to show that desertion without cause subsisted throughout the period. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the three year period, that the petitioner should be able honestly to say that he or she were willing to fulfil the duties of marriage and that desertion was against his or her will and continued throughout the period without his or her consent. The court must be satisfied on the evidence that desertion is proved and it must be proved beyond reasonable doubt. The evidence need not reach certainty but it must reach a high degree of probability.

The court also demands that when a matrimonial offence, whatever it is, is charged, if possible the evidence of the spouse making the charge should be corroborated. The necessity for corroboration is not an absolute rule of law and while corroboration is desirable and usual there is no rule which prevents a tribunal from finding the offence proved in the absence of corroboration.

It has been alleged here that this was not a case of actual desertion but was a case of constructive desertion. I think this is what *Halsbury's* says on constructive desertion (vol. 12 p. 247):—

"In the case of constructive desertion the onus of proving that the intention to desert continues may be much lighter than in the case of mere withdrawal from cohabitation. A mere wish or intention that the other spouse should leave is insufficient by itself to constitute constructive desertion. The wish or intention must be accompanied by conduct which is of a grave and weighty character and which the court can properly regard as equivalent to expulsion of fact."

Now so much for the first point. Having seen the petitioner and having heard her evidence, all she has to offer by way of evidence to show that there was constructive desertion are several acts of the respondent, one of which is contained in paragraph 14. The petitioner alleged that during the Singhalese and Tamil riots in Ceylon in 1958 the husband turned out to be a coward. He turned away and hid under the bed while the rioters assaulted the petitioner. I do not know how it can be said an act of cowardice of this nature can be regarded as desertion. This was in 1958. Apparently even after this incident the parties continued to cohabit because after the riots the petitioner gave birth to the third child and after that certain other events also took place. How under these circumstances can this court infer that there was constructive desertion on the part of the husband, I really fail to see. What seems clear was that some time after this incident the petitioner left the husband, first by sending the children back to Malaya and then following the children and settling down in Malaya and obtaining a job here.